No. 77-375

In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES NUCLEAR REGULATORY COMMISSION, ET AL., APPELLANTS

v.

CAROLINA ENVIRONMENTAL STUDY GROUP, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

BRIEF FOR THE UNITED STATES NUCLEAR REGULATORY COMMISSION

WADE H. McCREE, Jr.,
Solicitor General,
BARBARA ALLEN BABCOCK,
Assistant Attorney General,
KEITH A. JONES,
Deputy Solicitor General,
HARRIET S. SHAPIRO,
Assistant to the Solicitor General,
ROBERT E. KOPP,
THOMAS G. WILSON,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

JEROME NELSON,
General Counsel,
STEPHEN F. EILPERIN,
Solicitor,
E. LEO SLAGGIE,
WILLIAM M. SHIELDS,
ERIC E. JAKEL,
MARC R. STAENBERG,
Attorneys,
Nuclear Regulatory Commission,
Washington, D.C. 20555.

INDEX

CITATIONS

332-903—77

Cases—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-375

UNITED STATES NUCLEAR REGULATORY COMMISSION, ET AL., APPELLANTS

v.

CAROLINA ENVIRONMENTAL STUDY GROUP, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

BRIEF FOR THE UNITED STATES NUCLEAR REGULATORY COMMISSION

OPINION BELOW

The opinion of the district court (J.S. App. A, pp. 1a–61a) is reported at 431 F. Supp. 203

JURISDICTION

The judgment of the district court declaring unconstitutional 42 U.S.C. (Supp. V) 2210(e) was entered on April 14, 1977 (J.S. App. B, pp. 62a–63a). A notice of appeal to this Court was filed on May 13, 1977 (J.S.

App. B, p. 64a). On July 6, 1977, the Chief Justice extended the time for docketing the appeal to and including September 10, 1977. The jurisdictional statement was filed on September 9, 1977, and on November 7, 1977, this Court noted probable jurisdiction and consolidated this case with the appeal from the same judgment by Duke Power Company in No. 77–262. Jurisdiction is conferred on this Court by 28 U.S.C. 1252. See *Weinberger* v. *Salfi*, 422 U.S. 749, 763 n. 8.

QUESTION PRESENTED

Whether the statutory limitation on liability arising from a single nuclear incident is constitutional.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 170e of the Atomic Energy Act of 1954, as amended, 89 Stat. 1113, 42 U.S.C. (Supp. V) 2210(e), provides in pertinent part:

> The aggregate liability for a single nuclear incident of persons indemnified, including the reasonable costs of investigating and settling claims and defending suits for damage, shall not exceed (1) the sum of $500,000,000 together with the amount of financial protection required of the licensee or contractor or (2) if the amount of financial protection required of

> the licensee exceeds $60,000,000, such aggregate liability shall not exceed the sum of $560,000,000 or the amount of financial protection required of the licensee, whichever amount is greater: *Provided*, That in the event of a nuclear incident involving damages in excess of that amount of aggregate liability, the Congress will thoroughly review the particular incident and will take whatever action is deemed necessary and appropriate to protect the public from the consequences of a disaster of such magnitude * * *.

STATEMENT

Appellees brought this action in the United States District Court for the Western District of North Carolina, challenging an order of the Atomic Energy Commission [1] that granted Duke Power Company permission to build two nuclear power plants for the generation of electricity near Charlotte, North Carolina. The Commission moved to dismiss on the ground that review lay in the court of appeals under 28 U.S.C. 2342(4). The district court thereupon stayed further proceedings pending disposition of a suit for review filed by appellees in the United States Court of Appeals for the District of Columbia Circuit.

The court of appeals sustained the Commission's order. *Carolina Environmental Study Group* v. *United*

[1] Pursuant to the Energy Reorganization Act of 1974, 88 Stat. 1233, 42 U.S.C. (Supp. V) 5801 *et seq.*, the Nuclear Regulatory Commission has succeeded to the licensing and other related regulatory functions of the Atomic Energy Commission.

States, 510 F. 2d 796. Thereafter, the district court determined that it still had jurisdiction to decide whether 42 U.S.C. (Supp. V) 2210(e), which limits the aggregate liability for a single nuclear incident to $560 million, is constitutional.

The district court first considered the threshold issues of standing and ripeness. The court found that the construction and operation of the power plants would have immediate adverse consequences for appellees, including exposure to a small amount of radiation, the heating of nearby recreational lakes, and the engendering of present fear of a future major nuclear accident at one of the plants; that the operation of the plants also would pose the risk of future adverse consequences, in the form of personal injury or property loss arising from a nuclear accident; and that Duke Power Company would not have undertaken the construction of the plants in the absence of the statutory limitation on liability. On the basis of these findings, the court concluded that appellees had standing to challenge the constitutionality of the statutory limitation and that the issue was ripe for adjudication.

On the merits, the district court held that the limitation on liability violates the due process and equal protection principles of the Fifth Amendment. With respect to due process, the court concluded that the limitation on liability deprives victims of nuclear accidents of any reasonable certainty of full compensation, without an adequate *quid pro quo.* With respect to

equal protection, the court reasoned that the statute irrationally places the risk of a major nuclear accident upon people who live near nuclear power plants, that it irrationally places a greater burden upon people injured by a nuclear accident than is placed upon people injured by other types of accidents, and that the limitation on liability serves no legitimate public purpose. Accordingly, the court declared unconstitutional 42 U.S.C. (Supp. V) 2210(e) "and any other provision necessary to implement the $560-million limitation of liability therein" (J.S. App. B, p. 63a).

INTRODUCTION AND SUMMARY OF ARGUMENT

On this appeal, the Nuclear Regulatory Commission has presented only the question whether the statutory limitation on liability arising from a nuclear accident is constitutional. Duke Power Company, appellant in No. 77–262, additionally has presented the questions whether appellees have standing to raise the constitutional issue and whether that issue is ripe for adjudication.

The questions of standing and ripeness are not frivolous. There has never been a nuclear accident resulting even in substantial offsite damage, let alone an accident of the magnitude that would bring into play the statutory limitation on liability. Nor is there any reason to think that, if such an accident should occur in the future, appellees will be its victims.

The district court, however, determined that standing and ripeness could exist even though the statutory limitation on liability may never be applied to ap-

pellees or anyone else. The court reasoned that to the extent that the statutory limitation serves to facilitate the construction and operation of nuclear power plants, persons alleging that they will be injured by such construction and operation have standing to challenge the statute; as a corollary, the court reasoned that the ripeness of such a challenge must be measured by the imminence of the specific injury alleged. On its face, that reasoning appears correct.

With respect to the facts, the district court found, first, that Duke Power Company would not have undertaken construction of the two nuclear power plants that initially were at issue but for the statutory limitation on liability (J.S. App. A, pp. 30a–40a, 43a) and, second, that the operation of those plants will cause present and certain injury to appellees in the forms, *inter alia,* of increased radiation and thermal pollution (J.S. App. A, pp. 43a–44a). Although it may be questioned whether exposure to the thermal pollution and insubstantial amount of additional radiation that will be caused by the plants constitutes a legally cognizable injury, we do not here contend that the district court's findings are clearly erroneous. If those findings are accepted as correct, appellees' action would appear to satisfy the minimum standing and ripeness requirements of Article III. Cf. *Arlington Heights* v. *Metropolitan Housing Corp.,* 429 U.S. 252, 263–264.

Accordingly, we believe that this Court has power to decide the constitutional issue presented by the

Commission. Prudential considerations, moreover, strongly militate in favor of a decision on the merits. As we discuss further below (pp. 14–15, *infra*), a principal legislative purpose of the statutory limitation on liability was to remove the specter of ruinous tort liability, which stood as a major impediment to private participation in the development of nuclear energy. That purpose might be largely frustrated if this case were disposed of in a manner that failed to resolve the doubts, engendered by the decision below, concerning the scope of private liability in the event of a major nuclear accident. In these circumstances, the Court should exercise its constitutional power to decide this case on its merits.

The Price-Anderson Act requires the operators of large nuclear power plants to maintain the maximum amount of financial protection against public liability reasonably available from private sources, and in the event of a major nuclear accident to contribute a substantial deferred premium to create a secondary insurance pool. In addition, the Commission must indemnify the licensee and others who may be liable for injuries to the public in an amount exceeding the primary and secondary insurance. Total public liability is limited by the statute to $560 million for a single incident, or the amount of primary and secondary insurance, whichever is greater.

This statutory scheme was developed to remove the significant impediment to private participation in

the development of peaceful uses of nuclear energy posed by the possibility of accidents resulting in enormous liability, and to assure the availability of substantial funds for the satisfaction of claims arising out of such accidents. It is a rational legislative means of removing a significant obstacle to the achievement of a valid federal policy.

Nothing in the Due Process Clause prevents Congress from imposing a limitation on liability as a part of such a rational legislative scheme. Nor is the congressional choice of the particular dollar amount of the liability limitation a denial of due process. Congress reasonably concluded, both in 1957 when the statute was enacted and in 1975 when it was most recently amended, that nuclear accidents causing injuries exceeding $560 million were sufficiently unlikely that it was unnecessary as well as impractical to specify in advance how, if it were in the public interest to do so, compensation might be provided. Instead, in 1975 Congress enacted a promise to review any nuclear accident causing public injuries in excess of the current limitation on liability and to "take whatever action is deemed necessary and appropriate to protect the public from the consequences of a disaster of such magnitude" (42 U.S.C. (Supp. V) 2210(e)).

Nor does due process prohibit the legislature from limiting, or even abolishing, common law causes of action without providing any *quid pro quo*. Laws

limiting liability are an accepted feature of our society. For example, the laws of every state permit individuals to limit their liability by incorporation, although persons who may be injured by the corporation's activities may thereby be deprived of compensation they might otherwise have received from the owners of the corporate enterprise. In any event, the Price-Anderson Act contains an ample *quid pro quo,* since it provides for the waiver of defenses and assures the availability of a very substantial sum for the payment of claims.

The limitation on liability does not effect a taking for public use of appellees' property without just compensation, in violation of the Fifth Amendment. A change in the law that affects no vested rights does not take "property." Moreover, the Act is a proper exercise of federal regulatory powers that does not directly encroach on the use of private property and thus involves no "taking."

ARGUMENT

THE STATUTORY LIMITATION ON LIABILITY IS CONSTITUTIONAL

Pursuant to the Price-Anderson Act, 42 U.S.C. (and Supp. V) 2210, each recipient of a license issued by the Nuclear Regulatory Commission (see note 1, *supra*) authorizing the construction or operation of a nuclear power plant with a rated capacity of

not less than 100,000 kilowatts electrical[2] must maintain specific forms of financial protection against liability claims arising out of a "nuclear incident."[3] Each such licensee must maintain, as its primary insurance amount, "the maximum amount [of liability insurance] available at reasonable cost and on reasonable terms from private sources." 42 U.S.C. (Supp. V) 2210(b).[4] The licensee also must participate in a secondary insurance pool into which each licensee is liable to pay a "deferred premium" of up to $5 million for each of its nuclear facilities in the event of a major nuclear incident (the "secondary insurance amount").

---

[2] A typical commercial nuclear power plant would have a rated capacity of 1,000,000 kilowatts. United States Nuclear Regulatory Commission, *Reactor Safety Study, An Assessment of Accident Risks in U.S. Commercial Nuclear Power Plants* (WASH-1400), Executive Summary, p. 5 (October 1975), (hereinafter *Reactor Safety Study*).

[3] The term "nuclear incident," which we use interchangeably with "nuclear accident," is defined as "any occurrence, including an extraordinary nuclear occurrence, * * * causing * * * bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material * * *." 42 U.S.C. (Supp. V) 2014(q).

[4] The Commission has determined that the primary insurance amount, which was $60 million at the time the Price-Anderson Act was enacted in 1957, now is $140 million. 42 Fed. Reg. 20139. See also "AEC Staff Study of the Price-Anderson Act," Selected Materials on Atomic Energy Indemnity and Insurance Legislation, Joint Committee on Atomic Energy, 93d Cong., 2d Sess. 5 (Committee Print, 1974).

Ibid. See also 42 Fed. Reg. 49.[5] In addition, "[t]he Commission shall * * * agree to indemnify and hold harmless the licensee * * * from public liability arising from nuclear incidents which is in excess of the level of financial protection required of the licensee." 42 U.S.C. (Supp. V) 2210(c).[6]

The aggregate liability for a single nuclear incident of persons indemnified[7] "shall not exceed the sum of $560,000,000 or the amount of financial protection required of the licensee, whichever amount is greater

---

[5] The Commission has authorized the operation of 63 large nuclear power plants, so that the secondary insurance amount at present is $315 million. All of the power plants except the one most recently licensed are listed in "Operating Units—Status Report" NUREG 0020, November 1977, pp. 1–2 to 1–10.

[6] Similar indemnification agreements are entered into by the Department of Energy with contractors engaged in activities involving a risk of a substantial nuclear incident. 42 U.S.C. (Supp. V) 2210(d).

[7] The term "persons indemnified" includes, in addition to persons with whom an indemnity agreement is executed, "any other person who may be liable for public liability" as a result of a nuclear incident. 42 U.S.C. (Supp. V) 2014(t). Accordingly, the Commission's indemnification agreements, and the primary and secondary insurance, cover "any other person who may be liable." See 10 C.F.R. 140.91, Section II; 10 C.F.R. 140.92, Art. I, Para. 6. "For example, should offsite damage be caused by failure of a component, the public would have the benefit of the financial protection and related prompt compensation provisions of Price-Anderson, even though the vendor of the faulty part might otherwise be without substantial coverage." Hearings on H.R. 8631 before the Joint Committee on Atomic Energy, 94th Cong., 1st Sess. 67 (1975).

252-903—77——3

* * *." 42 U.S.C. (Supp. V) 2210(e).[8] The statute further provides, however, "[t]hat in the event of a nuclear incident involving damages in excess of that amount of aggregate liability, the Congress will throughly review the particular incident and will take whatever action is deemed necessary and appropriate to protect the public from the consequences of a disaster of such magnitude." *Ibid.*

In the event of a substantial nuclear incident, the Commission or any other interested party may request the federal district court in whose jurisdiction the incident occurred to determine whether the damages may exceed the limit of liability. 42 U.S.C. (and Supp. V) 2210(*o*). If the court determines that damages may exceed that amount, the court must approve a plan of distribution that includes provision for latent injury claims. *Ibid.* Prior to approval of a plan, however, distribution of amounts not in excess of 15 percent of the limit, *i.e.*, at present $84 million, may be made. *Ibid.* Pursuant to 42 U.S.C. (Supp. V) 2210 (m), the Commission has contracted with insurers for the investigation and prompt settlement of claims. See

[8] Since the required level of financial protection now is $455 million (see notes 4 and 5, *supra*), the current limit on liability is $560 million; the amount of the government's indemnity therefore now is $105 million. When the Price-Anderson Act was most recently amended, the Commission estimated that the required level of financial protection would reach $560 million by 1930, at which time the government's obligation to indemnify would terminate. See S. Rep. No. 94-454, 94th Cong., 1st Sess. 36 (1975). The Commission further estimated that by 1985 the required level of financial protection would exceed $1 billion. *Ibid.*

"AEC Staff Study of the Price-Anderson Act", *supra*, pp. 13–14; Brief Amici Curiae of Nuclear Energy Liability Property Insurance Association and Mutual Atomic Energy Liability Underwriters, pp. 4–7.

Furthermore, pursuant to 42 U.S.C. (Supp. V) 2210 (a) and (n), the Commission has required the insurance policies issued by private insurers and its own indemnity agreements to waive any defense as to the conduct of the claimant or fault of persons insured or indemnified, including negligence and contributory negligence, any defense of governmental or charitable immunity, and any defense based upon a statute of limitation in the case of actions brought within three years of the date by which the claimant should have known of his injury and not more than twenty years after the date of the nuclear incident. See 10 C.F.R. 140.81 to 140.85, 140.91 to 140.92.*

A. THE LIMITATION ON LIABILITY IS CONSISTENT WITH DUE PROCESS AND EQUAL PROTECTION

1. The limitation on liability is neither arbitrary nor irrational

The district court held that the statutory limitation of aggregate liability arising from a single nuclear incident violates due process because under the statutory scheme there is no "reasonable certainty that the

---

* The waiver of defenses applies only if the Commission determines that there has been an "extraordinary nuclear occurrence" involving substantial emission of radiation and substantial offsite injury to persons or property. 10 C.F.R. 140.81 to 140.85. This restriction was imposed out of concern that an unqualified waiver of defenses might encourage the bringing of nuisance suits. See H.R. Rep. No. 89-2043, 89th Cong., 2d Sess. 11 (1966).

victims will be justly compensated" (J. S. App. A, p. 50a). The question under the Due Process Clause, however, is not whether recovery is uncertain but, rather, whether the statutory scheme is arbitrary and irrational. "[L]egislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and * * * the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15. The statutory scheme challenged by appellees is neither arbitrary nor irrational, and it therefore meets the demands of due process.

Congress first authorized the private use of nuclear energy in the Atomic Energy Act of 1954, 68 Stat. 919, as amended, 42 U.S.C. 2011 *et seq.*, "in the hope and belief that the substantial entry of private industry into the atomic energy program would speed the further development of the peaceful uses of atomic energy, a major policy goal of the United States." H.R. Rep. No. 89-883, 89th Cong., 1st Sess. 4 (1965). See also 42 U.S.C. 2013(d). It soon became apparent, however, that private participation in the development of nuclear energy was severely inhibited by concern over the potentially enormous liability that might arise out of a nuclear accident. See "AEC Staff Study of the Price-Anderson Act," *supra*, pp. 1–2. Insurance was not available in amounts sufficient to cover such liability, and private corporations were reluctant or

unwilling to enter the field of nuclear energy if that would expose their shareholders to the risk of extraordinarily large, uncompensated losses. *Ibid.* See also J. S. App. A, pp. 30a–38a. See generally Green, *Nuclear Power: Risk, Liability, and Indemnity*, 71 Mich. L. Rev. 479, 483–484 (1973).

The Price-Anderson Act represents the congressional response to this problem. In the Act, Congress imposed a limitation on the liability that may arise out of a nuclear accident and provided a large governmental indemity that further reduced private exposure to uncompensated loss. See 42 U.S.C. (Supp. V) 2210(e). Those provisions were intended to remove the significant impediment that uninsured potential liability posed to private participation in the development of nuclear energy, while at the same time ensuring the availability of substantial funds for the satisfaction of valid claims arising out of a nuclear accident.

Although appellees may disagree with it, the encouragement of the "entry of private industry into the atomic energy program" unquestionably represents constitutionally permissible legislative policy. In light of the substantial evidence of private reluctance to accept the risk of virtually unlimited liability for nuclear accidents, the imposition of a statutory limitation on liability plainly was a rational legislative means of providing such encouragement. The statutory limitation was tailored to meet the specific problem with which Congress was faced, and the subse-

quent history of private nuclear development appears to illustrate that the limitation significantly assisted in the effectuation of the legislative policy. Indeed, appellees' underlying complaint seems to be not that the limitation on liability is not rationally related to a legislative purpose, but rather that, from their point of view, it has served that purpose only too well.

Thus there can be no doubt that Congress had power consistent with the Due Process Clause to impose some limitation on liability arising out of nuclear accidents as a means of facilitating private development of nuclear energy. At bottom, therefore, appellees' argument that the limitation is irrational reduces to a disagreement with Congress over the choice of a particular dollar amount. But surely Congress must be allowed very substantial leeway in specifying the dollar amount of a limitation. Specification of a fixed dollar amount is based upon legislative fact-finding and should not be subject to judicial second-guessing unless the congressional choice can be shown to be utterly arbitrary and frivolous. See, *e.g.*, *United States* v. *Carolene Products Co.*, 304 U.S. 144, 153–154; *Ferguson* v. *Skrupa*, 372 U.S. 726, 729. Appellees have made no such showing here.

In fixing a limit on the aggregate liability arising out of a nuclear accident, Congress acted on the basis of evidence that a fund of $560 million would be sufficient to provide full compensation in all reasonably conceivable circumstances. See Hearings on Govern-

mental Indemnity before the Joint Committee on Atomic Energy, 84th Cong., 2d Sess. 122–123 (1956).[10] Given the apparently extremely remote possibility of the occurrence of an accident in which the damages would exceed $500 million, Congress decided that, as a practical matter, it was unnecessary to make prior provision for such an accident. Instead, it concluded that it was best to decide after the fact how to deal with consequences of such accidents, if any occurred. S. Rep. No. 296, 85th Cong., 1st Sess. 21 (1957).

When Congress re-examined the liability limitation several years later, it reaffirmed its earlier judgment (H.R. Rep. No. 89–883, 89th Cong., 1st Sess. 6–7 (1965)):

> [T]his limitation does not, as a practical matter, detract from the public protection afforded by this legislation. In the first place, the likelihood of an accident occurring which would result in claims exceeding the sum of the financial protection required and the governmental indemnity is exceedingly remote, albeit theoretically possible. Perhaps more important, in the event of a national disaster of this magnitude, it is obvious that Congress would have to review the problem and take appropriate

[10] On March 22, 1957, the Atomic Energy Commission transmitted to the Joint Committee on Atomic Energy a report estimating the possible consequences of a major accident at a large nuclear power reactor. The transmittal letter from the Acting Chairman of the Commission stated that "[i]n the large majority of theoretical reactor accidents considered, the total assumed losses would not exceed a few hundred million dollars." Selected Materials on Atomic Energy Indemnity and Insurance Legislation, *supra*, p. 559.

> action. The history of other natural or man-made disasters, such as the Texas City incident, bears this out. The limitation of liability serves primarily as a device for facilitating further congressional review of such a situation, rather than an ultimate bar to further relief of the public.

Congress reviewed the matter again in 1974 and 1975 in order to determine whether the original limitation on liability continued to permit reasonable assurance of full recovery. At that time, Congress enacted the provision for secondary insurance, one consequence of which is that as additional nuclear power plants become operational, the limitation on liability eventually will rise. See 42 U.S.C. (Supp. V) 2210 (b) and (e). But Congress determined that no immediate change in the $560 million limit was appropriate, especially in light of evidence that "the probabilities of a nuclear incident are much lower and the likely consequences much less severe than has been thought previously." S. Rep. No. 94–454, 94th Cong., 1st Sess. 12 (1975). This determination was based in part on a three-year study conducted for the Commission by Dr. Norman C. Rasmussen of the Massachusetts Institute of Technology, which concluded that "nuclear power plants have achieved a relatively low level of risk compared to many other activities in which our society engages." Main Report, p. 131, *Reactor Safety Study, supra.*[11] On the basis of this study Dr.

[11] The study estimated the likelihood of a nuclear incident causing as much as $560 million in property damages to be no more

Rasmussen testified: "I believe that the current $560 million limit is a reasonable value at this time and will cover all combinations of circumstances which can reasonably be considered credible." Hearings on Possible Modification or Extension of the Price-Anderson Insurance and Indemnity Act before the Joint Committee on Atomic Energy, 93d Cong., 2d Sess. 643 (1974). Congress therefore had a rational basis for determining a limitation of $560 million would not prevent payment of adequate compensation for injuries to the public arising from any reasonably likely nuclear accident.

Moreover, in amending the Act in 1975 Congress enacted a promise to review any nuclear accident that caused injuries in excess of the statutory limit and to "take whatever action is deemed necessary and appropriate to protect the public from consequences of a disaster of such magnitude" (42 U.S.C. (Supp. V) 2210(e)),[12] thereby codifying its longstanding position that the limitation on liability was not intended as a complete bar to further relief. Congress reasonably determined that nuclear accidents causing injuries exceeding $560 million were sufficiently un-

---

than one per 500,000 reactor years of operation (App. 56). The report summarized, "[t]he possible consequences of potential reactor accidents are predicted to be no larger, and in many cases much smaller, than those of non-nuclear accidents." Executive Summary, p. 1, in *Reactor Safety Study*, *supra*.

[12] The most recent precedent for congressional action to aid disaster victims is Pub. L. 94–400, 90 Stat. 1211, in which Congress provided for the victims of the Teton Dam disaster.

likely that it was unnecessary as well as impractical to attempt to specify in advance how, if it were in the public interest to do so, compensation might be provided.

In short, the statutory scheme challenged by appellees represents the legislative accommodation of two competing interests—the public interest in expeditious development of nuclear energy for peaceful uses, and the private interest in protection against or compensation for injury suffered as a result of such development. Since that accommodation is not arbitrary and irrational, it should be sustained.

2. The limitation on liability is an integral part of a valid scheme of legislative compensation

a. Due process does not require that an injured party recover under a legislative compensation scheme as much as he might have recovered at common law. *New York Central R.R. Co.* v. *White,* 243 U.S. 188. A person has no vested interest in any rule of the common law. *Second Employers' Liability Cases,* 223 U.S. 1. Thus "legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations." *Usery* v. *Turner Elkhorn Mining Co., supra,* 428 U.S. at 16.

Common law rights may be abolished without the substitution of statutory rights as a *quid pro quo.* In *Silver* v. *Silver,* 280 U.S. 117, for example, this Court held that the Fourteenth Amendment was not violated by the Connecticut Guest Statute, under which an individual carried gratuitously in an auto-

mobile was barred from recovery for injuries caused by the negligent operation of the vehicle. In so holding, the Court specifically stated that "the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object." 280 U.S. at 122. Similarly, in *Arizona Employers' Liability Cases*, 250 U.S. 400, this Court sustained an Arizona law that imposed strict liability upon companies engaged in hazardous activities, against a challenge that it denied due process by depriving the employer of common law defenses to future liability without giving him anything in return. See also *Carr* v. *United States*, 422 F. 2d 1007 (C.A. 4); *Keller* v. *Dravo Corp.*, 441 F. 2d 1239 (C.A. 5); *Thomason* v. *Sanchez*, 539 F. 2d 955 (C.A. 3), certiorari denied, 429 U.S. 1072; *Murray* v. *New York Central R. R. Co.*, 287 F. 2d 152 (CA. 2), certiorari denied *sub nom. Continental Grain Co.* v. *City of Buffalo*, 366 U.S. 945.

In particular, laws limiting liability without providing alternative compensation have long been a recognized and accepted feature of our legal system. The Act limiting the liability of shipowners dates from 1851 (9 Stat. 635; 46 U.S.C. 183), and has been judicially approved and enforced. See, *e.g., Providence & N.Y.S.S. Co.* v. *Hill Mfg. Co.*, 109 U.S. 578; *Murray* v. *New York Central R.R. Co., supra; Petition of Kinsman Transit Co.*, 338 F. 2d 708 (C.A. 2), certiorari denied, 380 U.S. 944. The Warsaw Convention on International Air Transportation, 49 Stat. 3000, 11 T.S. No. 876, 137 L.N.T.S., which limits

recovery for injuries suffered during international air travel, also has met with judicial approval. *Indemnity Ins. Co. of North America* v. *Pan American Airways*, 58 F. Supp. 338 (S.D. N.Y.). See also *Schloss* v. *Matteucci*, 260 F. 2d 16 (C.A. 10). But the most compelling and persuasive example of limited liability is furnished by the laws of every state permitting joint venturers, and even individual proprietors, to limit the liability arising out of their business ventures through the simple device of incorporation. Indeed, the corporation, which is an important and integral feature of this nation's economic system, would not exist if government lacked the power to limit liability as a means of facilitating the undertaking of commercial activities that pose a risk of loss to others. The universal existence of the corporation as a legal entity with limited liability, notwithstanding the fact that persons injured by a corporation's activities may be deprived of the compensation they otherwise could collect from its individual owners, is at odds with appellees' claim that the Contitution forbids the imposition of a limitation on liability in the public interest.[13]

---

[13] Appellees incorrectly suggest (Response, p. 17) that in *New York Central R. R. Co.* v. *White*, 243 U.S. 188, and *Crowell* v. *Benson*, 285 U.S. 22, this Court found the statutes involved were constitutional "because the statutes gave victims a '*quid pro quo*' to compensate for the limitation on liability". In *White*, the Court found it unnecessary to decide whether a state might "suddenly set aside all common law rules respecting liability as between employer and employee, without providing a reasonably just substi-

b. In fact, however, the Price-Anderson Act does contain a *quid pro quo* in the form of a reasonable scheme of compensation for persons injured by nuclear accidents. Under the Act and the implementing regulations, licensees are made liable without fault for any damage. 42 U.S.C. (Supp. V) 2210(a); 10 C.F.R. 140.91 to 140.95. Although the district court believed that strict liability would govern common law claims arising from a nuclear incident (J.S. App. A, pp. 52a–54a), the legislative history of the Price-Anderson Act indicates that there was substantial uncertainty whether strict liability would be applied in all states and that the provision for liability without fault was included to ensure that victims would be compensated even where accidents were not caused by willful or negligent acts or omissions. H.R. Rep. No. 89–2043, 89th Cong., 2d Sess. 6–8 (1966). Moreover, even where strict liability would be applied, it may be subject to exceptions. For example, injury resulting from acts of God, such as earthquakes, or acts of third parties, such as sabotage, may not give rise to strict liability even if the operation of a hazardous

---

tute". 243 U.S. at 201. In *Crowell*, the Court noted only that Congress could provide payments "which would reasonably approximate the probable damages" (285 U.S. at 41); it did not suggest that it was constitutionally compelled to do so. The state courts correctly have decided that no *quid pro quo* is constitutionally required. See, *e.g.*, *Montgomery* v. *Daniels*, 38 N.Y. 2d 41 (N.Y. Ct. of App.); *Jones* v. *State Board of Medicine*, 97 Idaho 859, 555, P. 2d 399, 409.

activity was an intervening cause. See Prosser, *Torts* 520–522 (4th ed. 1971). Under the Act, however, licensees will be liable for injuries caused by nuclear incidents resulting from occurrences such as earthquakes and sabotage.

Perhaps the major benefit afforded potential claimants by the Act, however, is the assurance that at least $560 million will be available for the payment of claims resulting from a major nuclear accident. Since the maximum amount of liability insurance currently available from private insurers is $140 million (see note 4, *supra*), the Act in effect ensures the availability of an additional $420 million for the payment of claims. Few defendants held liable at common law for damages caused by a major nuclear incident would be able to pay judgments in excess of that amount. See S. Rep. No. 296, *supra*, p. 15. There was testimony in this case, for example, that if a nuclear accident causing injuries in excess of $560 million occurred at one of the plants operated by Duke Power Company, which is the nation's tenth largest utility, that company would not be able to pay damage claims exceeding $200 million and still meet its other obligations (Tr. 474, 477, App. 393–394, 395).[14] The Act thus provides an important assurance to potential claimants that a large fund will be available to pay claims; without it, the right to sue for damages could be largely

[14] In the event of such an accident, the damage to the company's plant would be enormous, causing the company itself losses in excess of $1 billion (Tr. 436–437, App. 370–371).

illusory.[15] Congress was aware of this and other related considerations when it chose not to permit the Price-Anderson Act simply to expire (Hearings on H.R. 8631, *supra*, at 69 (testimony of Chairman Anders)):

> The primary defect of this alternative, however, is its failure to afford the public either a secure source of funds or a firm basis for legal liability with respect to new plants. While in theory no legal limit would be placed on liability, as a practical matter the public would be less assured of obtaining compensation than under

---

[15] Appellees argue that the availability of at least $560 million for the payment of claims does not constitute a *quid pro quo* because without the limitation on liability there would be no threat of a nuclear accident because no nuclear power plants would be in operation (Response, p. 20). It is certainly true that the limitation on liability eliminated a substantial obstacle to the construction and operation of nuclear power plants (see pp. 14–15, *supra*). But this is not to say that no such facilities would have been constructed in the absence of a limitation on liability. To the contrary, there is a reasonable likelihood that some nuclear power plants would have been constructed anyway (see, *e.g.*, Br. in Opp. to Mot. to Affirm in No. 77–262, at 5), and appellees' assertion to the contrary is speculation.

Appellees' argument, however, does serve to emphasize the analogy between the statute challenged here and state laws providing limited liability for corporations (see p. 22, *supra*). There may well be many risky or hazardous commercial activities that private investors would refuse to undertake without the protection afforded by corporate limited liability. But this fact does not render unconstitutional those state laws that confer limited liability upon corporations without furnishing a *quid pro quo* to persons who as a result may suffer uncompensated injury arising out of a corporation's activities.

> Price-Anderson. Establishing liability would depend in each case on state tort law and procedures, and these might or might not provide for no-fault liability, let alone the multiple other protections now embodied in Price-Anderson. The present assurance of prompt and equitable compensation under a pre-structured and nationally applicable protective system would give way to uncertainties, variations and potentially lengthy delays in recovery. It should be emphasized, moreover, that it is collecting a judgment, not filing a lawsuit, that counts. Even if defenses are waived under state law, a defendant with theoretically "unlimited" liability may be unable to pay a judgment once obtained. When the defendant's assets are exhausted by earlier judgments, subsequent claimants would be left with uncollectable awards. The prospect of inequitable distribution would produce a race to the courthouse door in contrast to the present system of assured orderly and equitable compensation. Moreover, to the extent that "uncovered" liability—liability not covered by equitable cost allocation of the Price-Anderson nature—must be absorbed by an individual utility, the result can impact on its consumers through impaired service or added economic burdens.[16]

The Act thus substitutes a reasonable statutory compensation scheme for pre-existing tort remedies. This

---

[16] The Act further provides coverage for injuries caused by persons such as suppliers and other third parties, who might otherwise lack substantial insurance coverage, and it in effect substitutes a generous statute of limitations for the state statutes that otherwise would govern. See note 7 and p. 13, *supra*.

Court has consistently upheld, as consistent with due process, workmen's compensation statutes that similarly replace traditional tort remedies with alternative compensation plans. *Crowell* v. *Benson, supra; New York Central R.R. Co.* v. *White, supra.* Like the comparable provisions of workmen's compensation statutes, the Price Anderson Act's limitation on liability comports with the requirements of due process.[17]

---

[17] The district court's statement that "[t]he Act tends to encourage irresponsibility in matters of safety and environmental protection" (J.S. App. 51a) is simply wrong. Licensees must strictly comply with the Commission's detailed safety regulations, which provide for a large margin of safety. "Issues of Financial Protection in Nuclear Activities," in Selected Materials on Atomic Energy Indemnity and Insurance Legislation, *supra*, pp. 61, 123; H.R. Rep. No. 93–1115, 93d Cong., 2d Sess. 13–14 (1974). Second, if a nuclear accident serious enough to cause substantial offsite damage ever should occur, it would also cause damage to the licensee's facility greatly in excess of any property insurance. Thus a principal loser in any nuclear incident will be the operator of the affected power plant; a major nuclear incident would destroy the plant or render it inoperable, with resultant loss both of asset value and operating revenues. The limitation on liability cannot significantly diminish the licensee's incentive to avoid a major nuclear incident. See Brief as Amici Curiae of Nuclear Energy Liability Property Insurance Association and Mutual Atomic Energy Liability Underwriters, pp. 8–11.

Similarly insubstantial is appellees' suggestion that the limitation on liability impermissibly interferes with state tort laws (Response, p. 26). Appellees refer to *National League of Cities* v. *Usery*, 426 U.S. 833, but in that case this Court made explicit that it was placing no restriction on "the authority of Congress to enact laws regulating individual businesses necessarily subject to the dual sovereignty of the government of the Nation and of the state in which they reside" (426 U.S. at 845).

3. The limitation on liability does not deny equal protection

The district court held that the statutory limitation on liability contravenes the principle of equal protection inherent in the Due Process Clause. At bottom, however, the district court's discussion of equal protection is little more than a reiteration of the basis for its holding with respect to due process, and appellees correctly have concluded that "the equal protection guarantee does not in this context add to other due process clause guarantees" (Response, p. 16, n. 12). Since it appears that appellees have abandoned equal protection as an independent ground for attacking the statute, we discuss that issue only briefly here.

The principal basis for the district court's holding with respect to equal protection appears to be its view that "[t]he Act irrationally and unreasonably places a greater burden upon people damaged by nuclear accident than upon people damaged by other types of accidents * * * involving power companies" (J. S. App. A, p. 57a).[18] But as we already have indicated (pp. 13–20, *supra*), Congress' decision to limit liability for nuclear accidents was not irrational or unreasonable: a major purpose of the Price Anderson

[18] The court also believed that "[t]he statute irrationally places the risk of major nuclear accident upon people who happen to live in the areas which may be touched by radioactive debris" (J.S. App. A, p. 57a). But the fact that those living near a nuclear power plant may be more likely to suffer injury in case of a nuclear accident at the plant in no way bears upon the rationality of Congress' decision to limit the aggregate liability arising from such an accident.

Act was to encourage private participation in the development of nuclear energy, and the limitation on liability is rationally related to that purpose. Thus, the difference in treatment accorded under the Act to persons injured in major nuclear accidents and the treatment accorded at common law to people damaged by other types of accidents is "reasonable, not arbitrary, and * * * rest[s] upon [a] ground of difference having a fair and substantial relation to the" *Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415. See also *Dandridge* v. *Williams*, 397 U.S. 471, 487; *Richardson* v. *Belcher*, 404 U.S. 78, 81.[19] Accordingly, the statute satisfies the requirements of equal protection.[20]

The district court nevertheless declared the statute unconstitutional because the court envisioned other methods, which it regarded as preferable, for providing recovery for injuries caused by nuclear accidents

---

[19] Moreover, as we also have shown above (pp. 23–27, *supra*), the statutory compensation scheme affords victims of nuclear accidents a *quid pro quo* in the forms of a guarantee of a large fund for payments of damages and of waiver of common law and some statutory defenses. As a consequence, such victims may recover more than similarly injured victims of nonnuclear accidents, who must rely upon common law tort remedies against private tortfeasors whose resources may be more limited.

[20] The district court incorrectly believed that "[t]he Act * * * relieves the owners of power plants of financial responsibility for nuclear accidents" (J.S. App. A, p. 57a). The Act requires owners to maintain the maximum amount of liability insurance available and binds them to a $5 million deferred premium for each facility, while doing nothing to relieve them of the risk of very substantial losses to their own property. See pp. 9–13 and note 17, *supra*.

(J.S. App. A, pp. 57a–58a). But the choice of method is for Congress, not for the courts. "It is not a function of the courts to speculate as to whether * * * the evils sought to be remedied could better have been regulated in some other manner." *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 378. See also *Mathews* v. *Diaz*, 426 U.S. 67, 84. The fact that Congress might have provided differently does not render an otherwise rational decision irrational.

B. THE ACT DOES NOT EFFECT A TAKING WITHOUT JUST COMPENSATION

Appellees contend that the Price Anderson Act takes their property "for public use, without just compensation", in violation of the Fifth Amendment (Response, pp. 22–26). This contention, like the other arguments appellees make, rests upon the assumption that their likelihood of full recovery, in the case of a accident, is less under the Act than at common law. But as we have explained (pp. 24–27, *supra*), the likelihood of full recovery in fact may be greater under the Act. Moreover, the statutory limitation on liability does not necessarily place an irremovable cap on recovery. The Act simply distinguishes between accidents causing damages of less than $560 million [21] and those giving rise to greater damages; it provides fully for the former category of accidents, while reserving for later consideration the amount of additional compensation that may be appropriate in the

[21] As we note above (pp. 11–12), that figure will increase as more nuclear power plants begin operation.

latter. Thus, it cannot be said that the Act will operate to diminish the recovery of any injured person.[22]

But even if the Act does operate to diminish the recovery of persons injured as the result of a future nuclear incident, nevertheless the Act does not effect a "taking" of "property." A change in the law that affects no vested right does not take "property." "It should be clear that the threshold requirement of an interest which is 'eligible' * * * to have the opportunity of becoming protectible property [under the Just Compensation Clause] is that the economic interest has come into being as an interest recognizable at law." Sax, *Takings and the Police Power,* 74 Yale L.J. 36, 61 n. 134 (1964). Cf. *Silver* v. *Silver, supra.* Since no person had a vested right of recovery that was infringed by enactment of the Price-Anderson Act (cf. *Second Employers' Liability Cases, supra*), the Act did not take anyone's "property."

Moreover, the Act is a regulatory measure, which serves the public interest by inducing private participation in the development of nuclear energy and by providing a substantial fund for payment to persons who may be injured in nuclear accidents. Such a measure does not effect a "taking."[23] "[A]cts done in the proper exercise of governmental powers, and not directly encroaching upon private property,

[22] The Act is in sharp contrast to the statutes at issue in the cases upon which appellees rely, in which direct limitations were placed upon the use of private property. In particular, *Pennsyl-*

though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision." *Transportation Co.* v. *Chicago,* 99 U.S. 635, 642, See also *Knox* v. *Lee,* 12 Wall. 457, 551.

In particular, a statutory limitation on liability, enacted for legitimate regulatory purposes, does not effect a taking. That much would appear to be implicit in this Court's decisions sustaining statutory compensation schemes in such cases as *New York*

---

vania Coal Co. v. *Mahon*, 260 U.S. 393, concerned the validity of a Pennsylvania statute that prohibited the mining of certain deposits of coal. Similarly, in *Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555, a bank had been prohibited from gaining possession of mortgaged property through foreclosure after default. The Price Anderson Act places no similar restriction on appellees' use or enjoyment of property. Cf. *United States* v. *Causby*, 328 U.S. 256, 261–262.

[23] This Court has recently suggested with reference to a direct regulation of the use of private property that regulatory measures may be so onerous or unreasonable that they effect a taking of property. *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 594. But without the element of directness, an element missing here, the burden of regulation, however onerous, could not constitute a taking, for " 'it is the character of the invasion, not the amount of damages resulting from it * * * that determines the question whether it is a taking.' " *United States* v. *Causby*, *supra*, 328 U.S. at 266. In any event, we already have established that the statutory limitation on liability at issue here is neither arbitrary nor irrational (see pp. 13–20, *supra*).

Central R.R. Co. v. *White, supra,* and *Crowell* v. *Benson, supra.* It was never suggested in those cases that an employee who recovered less from his employees for a job-related injury than he might have received at common law would have a valid claim against the government for a taking of property. Yet that is essentially appellees' argument here.[24] That argument ignores a long line of decisions holding that even regulatory measures more directly placing restrictions on the use or enjoyment of property do not effect a Fifth Amendment taking. See, *e.g., Goldblatt* v. *Town of Hempstead, supra; United States* v. *Central Eureka Mining Co.,* 357 U.S. 155; *Bowles* v. *Willingham,* 321 U.S. 503. Those cases amply establish that a measure such as that at issue here does not constitute a taking of property.[25]

---

[24] The implications of appellees' argument that a governmental grant of limited liability effects a taking are broad indeed. It suggests, for example, that persons who are denied full compensation for injuries as a consequence of corporate limited liability may recover the amount of the deficiency from the state.

[25] In any event, a taking violates the Constitution only if it is not accompanied by just compensation. Appellees have not explained why, if, contrary to our submission, the Act may effect takings in the future by limiting recovery, they will be deprived of just compensation. Cf. *Regional Rail Reorganization Act Cases,* 419 U.S. 102. Thus, even if the Act effected a taking, it would not for that reason be unconstitutional.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.
BARBARA ALLEN BABCOCK,
Assistant Attorney General.
KEITH A. JONES,
Deputy Solicitor General.
HARRIET S. SHAPIRO,
Assistant to the Solicitor General.
ROBERT E. KOPP,
THOMAS G. WILSON,
Attorneys.

JEROME NELSON,
General Counsel,
STEPHEN F. EILPERIN,
Solicitor,
E. LEO SLAGGIE,
WILLIAM M. SHIELDS,
ERIC E. JAKEL,
MARC R. STAENBERG,
Attorneys,
Nuclear Regulatory Commission.

JANUARY 1978.

U.S. GOVERNMENT PRINTING OFFICE: 1977